Minutes of the
CRIMINAL SENTENCING COMMISSION
and the
CRIMINAL SENTENCING ADVISORY COMMITTEE
August 17, 2006

SENTENCING COMMISSION MEMBERS PRESENT
Common Pleas Court Judge Reggie Routson, Vice Chairman
OSBA Representative Max Kravitz
City Prosecutor Steve McIntosh
Kim Kehl, representing Director of Youth Services Tom Stickrath
Common Pleas Court Judge Andrew Nastoff
Steve VanDine, representing Director of Rehabilitation and Correction Terry Collins
Public Defender Yeura Venters
Prosecuting Attorney David Warren

ADVISORY COMMITTEE MEMBERS PRESENT
Lynn Grimshaw, OCCO
John Madigan, Senior Attorney, City of Toledo
Cynthia Mausser, Chairperson, Ohio Parole Board

STAFF PRESENT
Scott Anderson, Staff Attorney
David Diroll, Executive Director
Cynthia Ward, Administrative Assistant

GUESTS PRESENT
Malika Bartlett, Senate Democratic Caucus
Jeff Clark, Ohio Attorney General's Office
Amanda Cooper, aide, Representative Bob Latta
James Guy, Attorney, Department of Rehabilitation and Correction
Deborah Hoffman, Fiscal, Legislative Service Commission
Elizabeth Lust, aide, Senator Steve Austria
Christina Madriguera, Ohio Judicial Conference
John Murphy, Exec. Director, Ohio Prosecuting Attorneys' Association
Scott Neely, Department of Rehabilitation and Correction
Phil Nunes, Ohio Community Corrections Association
Becki Park, Senate Republican Caucus
Candace Peters, Office of Criminal Justice Services
Erin Rosen, Ohio Attorney General's Office

Common Pleas Court Judge Reggie Routson, Vice Chairman, called the August 17, 2006, meeting of the Ohio Criminal Sentencing Commission to order at 10:10 a.m.

Judge Routson reported that Chief Justice Moyer would be unable to join in today's meeting because he was recovering from recent hip surgery.

RAPE OF A CHILD UNDER AGE 13

Attention turned to the staff memo entitled "Hypothesized Revisions of Sex Offense Statutes" as Staff Attorney Scott Anderson reviewed the recent draft resulting from past discussions. While sorting out sexual offenses, Atty. Anderson noted that he tried to keep the distinctions between ages of the victim, circumstances surrounding the act, and the differences between sexual conduct and sexual contact.

Under the draft, proposed §2907.02 addresses sexual assault of a child while §2907.021 addresses other rapes. Based on discussions at prior Commission meetings, this is how the .02 section might look:

> (A) No person shall engage in sexual conduct with another who is under age 13, regardless of whether the offender knew the other person's age.
> (B) The penalty for violation of (A) is 10 years to life.
> (C) If the victim is younger than age 10, the penalty for violation of (A) is 15 years to life.
> (D) If force is used or threatened, or serious physical harm is caused during violation of (A), the penalty is 15 years to life.
> (E) If the person who violates (A) has already been convicted of a prior substantially similar offense, the penalty is 25 to life.
> (F) The penalty for attempts to commit the above offenses is one level lower:
>
> (1) 5 years to life for attempted sexual assault of a child;
> (2) 10 years to life for attempted sexual assault off a child under the age of 10;
> (3) 10 years to life for attempted aggravated sexual assault of a child; and
> (4) 15 years to life for attempted repeat sexual assault of a child.

Parole Board Chair Cynthia Mausser reported that most child sexual offenders currently serve 15 years in prison. She added that a violent sexual predator gets 5 years to life as a double sentence (underlying sex offense plus violent sexual predator specification).

In light of S.B. 2's efforts toward truth-in-sentencing, Common Pleas Court Judge Andrew Nastoff asked why the Commission was now moving toward indeterminate sentences.

This deals with predators that legislators have already decided to use indefinite terms and provides some supervision flexibility after the offender leaves prison, responded Director David Diroll.

Judge Nastoff argued that indeterminate sentences takes discretion from judges and gives it back to the Parole Board.

According to Atty. Anderson, this would allow the worst sex offenders to be incarcerated longer and prevent an overlap of double penalties.

Judge Nastoff said he assumes this will involve front-end determinations, rather than back end determinations, so that the judge can retain control of the decision.

John Murphy, Executive Director of the Ohio Prosecuting Attorneys' Association, recommended against changing the name of "rape" to "sexual assault of a child". Separately, in response to the discussion regarding distinguishing between force versus coercion in sex offenses with child victims, he remarked that good case law exists for the definition of force and that is should not be changed.

Noting that the proposed rape statute includes a definition of "force", OCCO Representative Lynn Grimshaw asked if the prosecutor would have to prove all of the elements of the offense first, and then establish the element of force.

It would be necessary, Atty. Anderson responded, to prove the offender engaged in sexual conduct with a child under the age of 13, and then prove the aggravator. There might be a force aggravator, an administering aggravator, or a serious physical harm aggravator, but not necessarily any relationship between any of them. He noted that, under *State v Eskridge*, force can be implied when the offender is a parent or stepparent and psychological coercion is involved.

Under *Eskridge*, said Judge Nastoff, there is no coercion that isn't force. Judge Nastoff also believes there is no maximum age requirement for the lessened standard of force in *Eskridge's* progeny.

Representing the Attorney General's Office, Erin Rosen remarked that *State v Eskridge* has been applied to victims over the age of 13. She pointed out, on the other hand, that in most cases physical force is regarded as worse than psychological force.

Coercion is less than force, so they can't be the same thing, Judge Nastoff argued.

OSBA Representative Max Kravitz stressed the need to keep the lines clean between "force" and "coercion" without being tied down by case law. He urged the Commission to keep it simple.

Cases involving coercion as opposed to physical force could also apply to cases with elderly and other vulnerable victims, Dir. Diroll noted.

Regarding the surreptitious administration of an intoxicant, Candace Peters, representing the Office of Criminal Justice Services, thought the aggravator would be irrelevant when the victim is under age 13 because the age factor alone enhances the penalty.

If the prosecutor cannot prove force but can prove the offender slipped the child an intoxicant, the prosecutor should have the freedom to kick the offense up a level, Atty. Anderson argued. Current law allows an increased penalty for force, serious harm, and administering a drug.

It would be a life sentence either way, said Judge Nastoff, because the victim is under age 10.

According to Atty. Anderson, the proposed offense under consideration is against a victim under age 13 and currently results in a sentence of 10 years to life. If the victim is under 10, that fact will be an aggravator to increase the penalty to 15 to life. He pointed out that,

although each of these sentences has a maximum of "life", the lower number designates when the offender can start seeking parole release.

The big plea motivator here, said Judge Nastoff, will be to get rid of the life tail.

If a prior offense is regarded as an aggravator to increase the penalty level, Atty. Anderson asked for input on whether a different penalty should be considered when the underlying offense is contained in proposed divisions (A), (C), or (D).

Ms. Peters wondered if it would affect whether the case has to go to a jury.

Probably so, if the penalty level is "life without parole" as opposed to 10 to life, Atty. Anderson responded.

According to Atty. Kravitz it does not currently go to a jury because it does not involve an additional finding.

Ms. Peters asked if "life without parole" should be written back into the statute.

It would be necessary to write 10 to life, 15 to life, or 20 to life into the statute, said Atty. Anderson. If this were not done, an aggravator could not be used to enhance the penalty because "life" means 10 to life with parole eligibility after 10 years have been served under current standards.

Judge Routson feels the administration of drugs to a child should be regarded as an aggravating factor itself.

According to Atty. Kravitz, if the offender gives the child an illegal drug then commits a rape, the charge falls under drug law as well as rape.

Atty. Anderson said that it would be regarded as an aggravator to a charge of forcible rape of a child under the draft.

Including the administering of an intoxicating agent as an aggravator to force is more relevant under the adult section than the juvenile section, said Ms. Peters. Slipping someone a drug is a way to overcome resistance. There is no issue of consent under age 13.

Noting that it is currently included in "force", Dir. Diroll asked how administering a drug to a child under age 13 should be treated.

Atty. Kravitz argued for the value of retaining a surreptitious element to it. If we keep it, he argued, we should make it separate and keep the definition of "force" clean.

Judge Nastoff argued that "administration of a drug or intoxicant" should be less of an aggravator than "force".

Phil Nunes argued to use it either as a replacement for "force" or a replacement for "consent".

Public Defender Yeura Venters suggested taking "administering an illegal drug to a child under 13" out as an aggravator or simply include it in the definition of "force".

Atty. Murphy informally moved, and Atty. Kravitz seconded, a motion that administering an illegal drug to a child under 13 should not be an aggravator nor contained in the definition of "force". By acclamation, the group agreed to delete the last sentence of (D), above.

Atty. Kravitz asked if attempts should be punished the same as completed acts. He noted that the General Assembly generally treats attempts as less serious than completed acts.

Mr. Nunes cautioned against setting penalties too low, particularly in light of pending legislation which dramatically increases penalties. Pending S.B. 260 makes most rapes eligible for a sentence of 25 to life, whereas the draft being discussed references 15 to life and only 10 to life for attempt. He suggested changing the penalty for violation of (C) sexual assault of a child younger than 10 years old to 20 years to life in prison and changing the penalty for violation of (D) (forcible) to 25 years to life. This would bring the proposal more in line with the goals of the legislators.

If the penalty is too high, said Atty. Anderson, it creates a gap between child rape and other rapes that causes problems rather than solving them, particularly since any plea negotiation is forced to use penalties must be much lower than the term for the charged crime. He also cautioned against setting the penalty in the same realm as murder, thus giving offenders a perverse incentive to kill their victims.

Higher penalties make it more difficult to prove the nuances of the crime without a witness, said Judge Nastoff, and a child under age 10 is usually unable to testify.

The options listed, said Atty. Venters, provide a logical progression, not just a knee jerk reaction.

Atty. Murphy pointed out that (D)'s use of force should state that it enhances: (A) sexual conduct with a child under age 13 *or* (C) sexual assault of a child under 10, not just (A). He further suggested enhancing (A) to 15 years to life and increasing the penalty for violation of (C) to 20 to life or life without parole.

RAPE OF A PERSON OVER AGE 13

Atty. Anderson pointed out that under draft §2907.021(A), the language "or threat of force" was inadvertently omitted and would be included in the next version.

Atty. Kravitz expressed concern about proposed .021(C), which would give all rapes indeterminate sentences up to life in prison. He understands it for child victims, but feels it should not be that way for all rapes. He feels the judge needs more discretion.

Another option, Atty. Anderson offered, would be to offer a broader, higher determinate range along lines once suggested by Cyndi Mausser,

say, determinate sentences every year for 5 to 15 years instead of the determinate range of definite sentences for 3 to 10 years.

Judge Nastoff suggested providing definite sentences up to the maximum, then indeterminate sentences beyond that up to life to get the benefit of both.

Judge Nastoff's scheme, said Atty. Kravitz, would reserve "life" for the worst offenders.

Defender Venters argued, however, that this would leave the defense attorney with no options for a plea bargain.

Ms. Peters suggested eliminating the "life" portion and stating a sentence as 6 to 15, 7 to 15, etc.

Judge Nastoff argued that the judge is elected to make decisions regarding an offender's sentence. The Parole Board was not elected. He maintained that it is an issue of accountability to the public.

Parole Board Chair Cynthia Mausser noted that the Board solicits the judge for his opinion when determining an inmate's potential for release. She argued that the judge usually does not know how the offender has progressed in treatment while in prison and someone should weigh all of the information.

Many offenders were told to expect certain sentence lengths for their offense and they plead accordingly, Atty. Kravitz remarked. Then the Parole Board overrode the expectation. He stressed that plea bargaining options must not be killed.

Under the pre-S.B. 2 indeterminate system, plea bargains were common, noted Atty. Murphy.

Judge Nastoff insisted that a hybrid structure is needed that combines a determinate and indeterminate sentence, not just one or the other.

As discussion continued after lunch on how to appropriately sentence forcible rapists, Dir. Diroll noted that it is a question of how to craft the alternatives and which form of sentencing to use.

As one alternative, Judge Nastoff suggested offering the choice of something other than life as the indeterminate "tail".

Noting that the Commission had not discussed post-release control (PRC) yet, Dir. Diroll noted that more flexible PRC could be used in lieu of an indeterminate sentence.

Judge Nastoff recommended allowing a longer post-release control tail that could be added to the maximum sentence.

According to Ms. Mausser, the Parole Board does not really want to require PRC supervision beyond 5 years, particularly since a post-release control violator can only be returned to incarceration for 9 months at a time.

No one wants to consider civil commitment as an option, said Ms. Peters, because it is a criminal problem, not just a mental health problem and civil commitment can end up costing four times as much.

Atty. Kravitz asked for data on how many offenders actually recommit sex offenses.

Ms. Peters remarked that, if you look at actual recommitment numbers, they are low. If you look at the numbers revealed through polygraph tests, they are extremely high.

According to Ms. Mausser, there are more programs available in prison for sex offenders than in the community. DRC now has more empirical information on the rates of recidivism for sex offenders.

Dir. Diroll asked for opinions on what the high end should be in an indeterminate scale for rape.

Referencing a recent high profile and ugly case, Judge Nastoff remarked that the offender had received a sentence of 5 to 25 years and is now being released after having served 20 years. Given the heinous and sadistic circumstances of the case, he does not feel the sentence was long enough. He would favor a life tail in cases like this.

Atty. Venters warned against generalizing all sex offenders. He acknowledged the need for some F-1 definite sentences and the need to develop an indeterminate hybrid for the most serious sex offenders.

The violent sex offender whose victim is an adult must be taken into consideration, Judge Nastoff declared, not just those involving child victims. He recommended a low determinate sentence with a 5 year post release control tail for low end offenders, a "life" sentence for the worst offender, and a broad range of indeterminate sentences with a number of post release control tails for those in the middle.

Atty. Kravitz urged the Commission to keep it simple and trust the judge to make the right call.

Prosecutor Dave Warren agreed with Ms. Mausser that the Parole Board bases a large part of their decision on facts that the judge did not have at the time of sentencing, enhancing public safety.

Judge Nastoff maintained that with the Parole Board, there is no face to be placed on whom is making the decision when an offender gets released from a sentence of 2 to life. There is little accountability for the Parole Board, but there is for the judge.

Atty. Kravitz contended that leaving the release decision up to the Parole Board, when indeterminate sentences are involved, hurts the innocent defendant who took a plea for a low sentence and is denied parole by the Board because he won't admit to the crime.

According to Mr. Nunes, the public has never felt that a judge sentenced a sex offender to too much time, but many people have felt that some sex offenders were sentenced to too little time. He noted that a sex offender who violates post-release control can only be sent

back for 9 months. So the Parole Board may be seeing behavior indicative of recidivism but not yet qualifying as a new crime.

Everyone tends to agree, said Judge Nastoff, that some sex offenders on the high end should never get out. For offenders on the low end of the scale, however, where the level of rape is more questionable, he asked whether the time of release should be decided by the judge or the Parole Board.

Atty. Anderson suggested that what is now called a sexual predator hearing could be helpful in determining which offenders should receive an indeterminate sentence. All rapists would receive a determinate sentence unless there was a showing that the offender is likely to reoffend. This group could get an indeterminate sentence with a life tail.

According to Atty. Rosen, not all sex offenders get an assessment or evaluation at that time.

On the other hand, said Jim Guy, counsel for DRC, a judge can already take assessment results into consideration.

Some members discussed the extent that a jury must be involved, as a matter of the 6th amendment jurisprudence or substantive due process, in deciding between determinate and indeterminate sentences.

If a statutory range up to "life" is defined, said Judge Nastoff, then *Blakely/Foster* issues will not come into play.

High level sex offenders are so unpredictable, said Ms. Peters. The determination of whether they are likely to reoffend is nearly impossible at the trial court level. The longer they are in treatment, however, the easier it becomes to predict their chances for recidivism.

If a judge is apprehensive about the offender, said Atty. Kravitz, he is likely to sentence at the high end with an indeterminate sentence and let the Parole Board decide the time of release. But only definite sentences should be available at the low end of the spectrum. He contended that the judge should have the ability to determine the offender's release if he wants to determine it and the ability to let the Parole Board decide if he wants them to.

Atty. Rosen expressed empathy with the frustration in trying to figure this out, noting that she sees a lot of issues rising out of this debate. She declared that something needs to be required to trigger the higher indefinite sentence in the discussed "hybrid" system.

It would be easier to get assessments at the front end of the process, said Atty. Guy, if such a requirement were built into the statute.

The legislature and judicial system should be willing to spend more time and money to do assessments in order to make adequate determinations, said Judge Routson. He stressed the need for more options and ranges for judges.

Atty. Mausser remarked that attention also must be given to sex offenses against adults, especially those causing serious physical harm.

DRC Research Director Steve VanDine reported that, according to a report last year, only a small portion of sex offense cases were "he said/she said" cases. Most cases at the low end of the punishment range for rape were more serious offenses that had been plead down. Since the sexual violent predator can be kept in prison for life, he recommended retaining that language. Regarding all of the options being discussed, he noted that it would be a very complex challenge to do it all within one section of the Revised Code.

Dir. Diroll agreed to have the staff work on developing a hybrid and forwarding it to Commission members within the next few weeks. He noted that there are no major votes expected in the legislature before the November election. S.B. 260 is expected to proceed, but he is not sure in what form. He remarked that it will be essential for the Commission to come to some kind of closure within the next month or two on the current issues so that a draft can be forwarded to the legislators.

Atty. Venters recommended at least offering the agreed upon alternative for child rape.

Judge Routson suggested either moving the October meeting up one or two weeks or scheduling a second meeting in September in hopes of presenting something to the legislators in October.

FUTURE MEETINGS

Future meetings of the Ohio Criminal Sentencing Commission have been tentatively scheduled for September 21, October 5, October 19, and November 16.

The meeting adjourned at 2:10 p.m.